No. 21-1270

In the Supreme Court of the United States

MOAC MALL HOLDINGS LLC, PETITIONER

v.

TRANSFORM HOLDCO LLC AND SEARS HOLDINGS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

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In *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), this Court established a bright-line test for determining whether a statutory prerequisite is "jurisdictional" in nature. Only if Congress "*clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional" will it be treated as such. *Id.* at 515-516 (emphasis added). Notwithstanding the clear-statement rule's seeming simplicity, the lower courts have been slow to embrace it. Nearly every year since *Arbaugh*, this Court has issued another opinion correcting the mis-identification of some limitation as jurisdictional; this case is yet another in that vein. The court of appeals did not purport to apply *Arbaugh*, and Transform does not seriously contend that 11 U.S.C. 363(m) contains a "clear statement" that the requirement of a stay pending appeal is a jurisdictional prerequisite.

Seeking to avoid the question on which the Court granted certiorari, Transform makes the threshold argument that, wholly apart from Section 363(m), the appellate courts lack jurisdiction because the lease's assignment destroyed the bankruptcy court's purportedly *in rem* jurisdiction, and there is no effective remedy to undo the assignment. This Court has already considered and rejected each of these arguments. The bankruptcy courts' jurisdiction is not exclusively *in rem*, but also *in personam*. *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 362, 371-372 (2006). And, even if the courts' jurisdiction did initiate as *in rem*, *Republic National Bank of Miami* v. *United States*, rejected as inconsistent with "common sense and fairness" the suggestion that transferring the property pursuant to court order deprives the appellate courts of jurisdiction to review that order. 506 U.S. 80, 88-89 (1992). Nor is there any need for a separate lawsuit, such as a Section 549 avoidance action, to recover the property. Because Transform—which initiated the assignment proceeding—is a party to the litigation, the court may simply vacate the assignment, which order would be binding on Transform.

On the merits, Section 363(m) contains no clear statement that a stay pending appeal is a jurisdictional prerequisite to appellate review. To the contrary, Section 363(m) contains *two* references to the appellate courts' exercise of jurisdiction, which confirms that the absence of a stay simply limits the availability of one type of remedy. Transform's invocation of "historical practice" to justify treating Section 363(m) as jurisdictional falls far short of the kind of widespread, century-long pedigree that the Court has demanded to overcome the absence of a clear statement. Transform

merely cites a few decisions applying a predecessor rule of bankruptcy procedure, none of which actually hold that the limitation is jurisdictional, at least when the transferee is a party to the appeal.

As a restriction on remedies only, the requirement of a stay was subject to waiver, forfeiture, and estoppel—all three of which apply here. Transform twice disavowed reliance on Section 363(m) before the bankruptcy court, which denied a stay in direct reliance on Transform's representations. And Transform failed to timely raise the defense before the district court. It is too late now for Transform to change its tune.

Finally, even if Section 363(m) were jurisdictional, it would not apply here, because vacating the Assignment Order would not invalidate (or alter in any way) the already consummated Sale Order. Transform's assertion that the Assignment Order, which was entered under 11 U.S.C. 365, is itself a sale order subject to Section 363(m) fails. Section 363(m) applies only to orders entered pursuant to Section 363(b) or (c), which is not the case here.

ARGUMENT

I. ASSIGNMENT OF THE MOAC LEASE DID NOT DESTROY JURISDICTION, AND THE COURTS CAN ORDER EFFECTIVE RELIEF

A. Sears' Assignment of the MOAC Lease Did Not Divest the Appellate Courts of Jurisdiction to Review the Assignment Order

1. Bankruptcy courts' jurisdiction is not exclusively in rem, *and Transform voluntarily consented to the courts' jurisdiction*

Transform's lead argument proceeds from a flawed legal foundation—Transform presumes that because Congress granted bankruptcy courts "exclusive jurisdiction" over "property of the estate," 28 U.S.C. 1334(e), the bankruptcy courts' jurisdiction depends exclusively on possession of the *res*. See Resp. Br. 25. That is a non-sequitur. The jurisdictional grant in Section 1334 is broad and not solely *in rem*. Transform tellingly omits any reference in its brief to Subsections (a) and (b) of Section 1334. Those subsections make no reference to "property" or "the estate." Rather, they broadly grant the district courts jurisdiction over "all cases under title 11" and "all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. 1334(a)-(b). When, in 1978, Congress first adopted that language, the Senate Report observed that "[t]he adjunct bankruptcy courts will exercise *in personam* jurisdiction as well as *in rem* jurisdiction in order that they may handle everything that arises in a bankruptcy case." S. Rep. No. 989, 95th Cong., 2d Sess. 153-154 (1978). The House Report likewise observed that by granting the courts "jurisdiction over 'all proceedings arising under title 11, or aris-

ing under or related to a case under title 11,'" "[p]ossession or consent will no longer be necessary to the jurisdiction of the bankruptcy courts." H.R. Rep. No. 595, 95th Cong., 2d Sess. 13 (1978).[1]

This Court likewise has recognized that the bankruptcy courts, in addition to exercising *in rem* jurisdiction, can also issue "*in personam* process" to compel the turnover of property. *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 362, 371-372 (2006); see *Stern* v. *Marshall*, 564 U.S. 462, 474-475 (2011) ("Vickie's counterclaim against Pierce" falls "under the plain text of § 157(b)(2)(C)," which parallels Section 1334(b)); *Marshall* v. *Marshall*, 547 U.S. 293, 312 (2006) ("Vickie seeks an *in personam* judgment against Pierce."). Debtors who file voluntary bankruptcy petitions and creditors who file proofs of claim become "subject to the bankruptcy court's *in personam* jurisdiction." *In re Sasson*, 424 F.3d 864, 870 (9th Cir. 2005).

Transform's presumption that the sole jurisdictional basis for the bankruptcy court's Assignment Order was *in rem* lacks any basis. The Assignment Order makes no reference to 28 U.S.C. 1334(e), but rather rests jurisdiction on "28 U.S.C. 157(a)-(b) and 1334(b)." Pet. App. 107a. Like a debtor who files a bankruptcy petition or creditor who files a proof of claim, Transform voluntarily submitted to the bankruptcy court's *in personam* jurisdiction by both (a) participating in

[1] The language of Section 1334(a) and (b) was initially adopted in 1978 as Section 1471, granting the jurisdiction to bankruptcy courts; it was reenacted in 1984 as Section 1334, granting that authority in the first instance to district courts. See *Wood* v. *Wood (In re Wood)*, 825 F.2d 90, 92 (5th Cir. 1987).

Sears' bidding process (under which all bidders consented to the bankruptcy court's jurisdiction over all sale issues and agreements relating to sale transactions), and (b) initiating the assignment proceeding by filing a notice of assumption and assignment of the MOAC Lease. J.A. 47, 50; Bankr. Ct. Doc. 816, at 22 (Nov. 19, 2018). The Assignment Order further confirms that Transform submitted to the bankruptcy court's continuing jurisdiction over all disputes relating to "the Sale Order, th[e] [Assignment] Order, [and] the Asset Purchase Agreement (and such other related agreements, documents or other instruments)," which unquestionably includes Sears' assignment of the MOAC Lease. Pet. App. 124a.

Because Transform was subject to the bankruptcy court's *in personam* jurisdiction concerning the Assignment Order and related assignment, the question whether the court retained *in rem* jurisdiction over the MOAC Lease after its assignment is irrelevant.

2. Even if the bankruptcy court's jurisdiction were initially in rem, *the property's transfer would not destroy that jurisdiction*

Even assuming the bankruptcy court's jurisdiction over the assignment proceeding were initially *in rem*, this Court's decision in *Republic* rejected the very argument Transform advances here. In *Republic*, the district court's jurisdiction was indisputably *in rem*, yet the Court "h[e]ld that, in an *in rem* forfeiture action, the Court of Appeals is not divested of jurisdiction by the prevailing party's transfer of the res from the district." *Republic Nat'l Bank of Mia.* v. *United States*, 506 U.S. 80, 88-89 (1992). The Court observed that the rule advocated here by Transform would "override

common sense and fairness." *Ibid.* More specifically, the Court explained: "We do not understand the law to be that an actual and continuous possession of the *res* is required to sustain the jurisdiction of the court." *Id.* at 85 (quoting *The Rio Grande*, 90 U.S. (23 Wall.) 458, 463 (1874)).

Congress has indicated that it shares this Court's understanding. Transform cannot square its *in rem* argument with the text of Section 363(m). If Transform were correct, appellate courts would lack jurisdiction to invalidate *all* unstayed sale orders after the property was transferred, even if the buyer did not purchase in good faith. Yet, Congress expressly contemplated an exercise of jurisdiction in that circumstance, 11 U.S.C. 363(m), as Transform acknowledges (Resp. Br. 31). Thus, Section 363(m) confirms that Congress does not understand the transfer of estate property pursuant to court order to destroy an appellate court's jurisdiction to review that transfer.

Outside of the Section 363(m) context as well, numerous courts of appeal have upheld jurisdiction to remedy an improper sale or assignment order notwithstanding the orders were unstayed and the property transferred. See, *e.g.*, *M.R.R. Traders, Inc.* v. *Cave Atlantique, Inc.*, 788 F.2d 816, 817-819 (1st Cir. 1986) (affirming the bankruptcy court's order to "set[] aside [an] already completed sale" because of improper notice of the sale); *In re Lintz West Side Lumber, Inc.*, 655 F.2d 786, 792 (7th Cir. 1981) (affirming order to set aside abandonment of estate property to secured creditors); *Wolverton* v. *Shell Oil Co.*, 442 F.2d 666, 670 (9th Cir. 1971) (affirming order setting aside sale due to lack of notice to creditors); *In re F.A. Potts & Co., Inc.*, 86 B.R.

853, 861 (Bankr. E.D. Pa.) (vacating order approving a sale and voiding the sale), order aff'd, 93 B.R. 62 (E.D. Pa. 1988), aff'd, 891 F.2d 280 (3d Cir. 1989).

By contrast, none of the cases Transform cites for its *in rem* jurisdiction argument involved (as *Republic* did) appeal of an order approving transfer of the property to a party in the litigation. Transform is particularly mistaken in citing *The Ann*, 13 U.S. (9 Cranch) 289 (1815), for the proposition that "[w]hen that custody [of the property] is relinquished by court order, *in rem* jurisdiction ceases." Resp. Br. 24-25. *Republic* rejected precisely that misreading. Rather, the Court held, *The Ann* "stands for nothing more" than "simply restat[ing] the rule that the court must have actual or constructive control of the res when an *in rem* forfeiture suit is initiated." *Republic*, 506 U.S. at 87.

The bankruptcy cases Transform cites are likewise irrelevant. As the Third Circuit has explained, those cases hold only that a party cannot, merely by tracing title in property to a bankrupt, thereby "invoke federal jurisdiction to settle disputes affecting that property" where the dispute has "no relation to the bankruptcy proceeding." *In re Hall's Motor Transit Co.*, 889 F.2d 520, 523 (1989); see also *In re Skuna River Lumber, LLC*, 564 F.3d 353, 355 (5th Cir. 2009) (no jurisdiction to impose a judicial lien on assets that were subject of prior, unappealed sale order that transferred assets free and clear of all liens); *Gardner* v. *United States (In re Gardner)*, 913 F.2d 1515, 1518 (10th Cir. 1990) (no jurisdiction to determine relative priority of liens over property that was exempt from the bankruptcy estate); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788-789 (11th Cir. 1990) (no jurisdiction for civil contempt action in-

volving disputes between two non-debtors over property sold during the bankruptcy because the matter had no relation to the bankruptcy); *In re Chicago, Rock Island & Pac. R.R.*, 794 F.2d 1182, 1186 (7th Cir. 1986) (no jurisdiction over dispute between non-debtors regarding rent chargeable for property that was previously sold in bankruptcy). Transform relies primarily on *In re FedPak Sys., Inc.*, 80 F.3d 207 (7th Cir. 1996), but that case held only that there was no bankruptcy jurisdiction to determine relative rights of two non-debtors in property that was subject to a prior, unappealed sale order. *Id.* at 211-213. That says nothing about whether an appellate court retains jurisdiction to review an order authorizing transfer of property from the estate to another party before it.

B. The Appellate Courts Can Grant MOAC Effective Relief, Without Resort to Section 549

Transform's argument that Bankruptcy Code Section 549 provides the only avenue for relief is similarly baseless. Resp. Br. 27-29. Section 549 creates a bankruptcy estate cause of action enabling (among other things) trustees to avoid for the benefit of creditors certain post-petition transfers that were "not authorized * * * by the court." See 11 U.S.C. 549(a). The assignment here was made *with* court authorization, which was timely appealed. There is no requirement that an appellant must also seek and obtain derivative standing and file a post-petition avoidance action to preserve its rights on appeal.

1. Transform's argument tracks the argument the United States made in the *Republic* case, which this Court rejected; it fares no better now. In *Republic*, the United States argued (in addition to its *in rem* argu-

ment discussed above) that because the property had been transferred to the United States Treasury after the district court's forfeiture order, the courts could not order effective relief, which required Congressional appropriation. See 506 U.S. at 89 (opinion of Blackmun, J.) (noting government's "useless judgment" argument). The Court majority rejected that argument, holding that Congressional appropriation to pay "final judgments rendered by a district court" was sufficient basis to compel return of the property upon reversal of the forfeiture order. *Id.* at 95-96 (Rehnquist, C.J., for the Court). In other words, there was no need for a separate lawsuit against the United States to recover the property (which would have had to be brought in the Court of Federal Claims). The district court whose jurisdiction the United States had invoked to order the forfeiture could simply enter final judgment ordering the forfeited property returned. Likewise here, the courts can simply enter an order voiding transfer of the MOAC Lease, which judgment would be binding on Transform. There is no need for a separate action, much less one under Section 549.[2]

[2] Transform tries to analogize the relief here (voiding assignment of the MOAC Lease) to an order in *Republic* "unwinding the sale of the residence itself" (the proceeds of which had been deposited with the Court). Resp. Br. 40. But Transform's relative position is analogous to the United States' in *Republic*, not the residence purchaser's. Transform voluntarily submitted to the bankruptcy court's jurisdiction as part of the bidding process and initiated the proceeding seeking the lease's assignment, just as the United States did in *Republic*. J.A. 47, 50; Bankr. Ct. Doc. 816, at 22 (Nov. 19, 2018).

Transform's argument about Section 549 suffers from the same logical fallacy as its *in rem* argument—it erroneously infers that because Congress granted debtors a cause of action to avoid unauthorized transfers of estate property, that must be the *exclusive* mechanism for doing so. But, that does not follow. Section 549 does not state that it is the exclusive means of invalidating a transfer, and Transform acknowledges there are others, including Section 363(n). By its text, Section 549 governs transfers "not authorized * * * by the court," 11 U.S.C. 549(a)(2), but here the transfer *was* court authorized, albeit erroneously. Moreover, for reasons Transform highlights, Section 549 is a poor fit as the mechanism to unwind the MOAC lease assignment, because that statutory remedy belongs to the debtor, not the competing claimant. Transform's construction would permit gamesmanship, as reflected by Transform's contention that MOAC's purportedly exclusive remedy was foreclosed from the outset by Sears' waiver of its Section 549 rights in the Sale Order. Resp. Br. 28. That is too cute by half. The better reading, and the one consistent with *Republic*, is that Section 549 is simply irrelevant, because the bankruptcy court on remand can void the assignment without any separate action.

2. Transform also argues that "[b]ecause Sears assumed the lease prior to its transfer, reversing the assignment would merely cause the leasehold interest to revert to the estate" and, therefore, MOAC has insufficient interest for standing. Resp. Br. 32-33. To the contrary, MOAC has a direct interest as landlord in ensuring the financial qualifications of any assignee. Recognizing that interest, Congress established in Section 365(b)(3) strict adequate assurance requirements for

proposed assignees of shopping center leases, which Transform did not satisfy. Pet. App. 89a-100a. MOAC has standing to vindicate those substantial rights.

Second, in this case, MOAC's interest is even more direct. Vacatur of the Assignment Order, as the district court originally ordered, would also vacate Sears' assumption of the MOAC Lease.[3] Pet. App. 100a (the Assignment Order "is VACATED to the extent it approved the assumption and assignment of the Sears Lease"). Without timely assumption of the lease by the debtor, the property would revert to MOAC. See 11 U.S.C. 365(d)(4) (a debtor "shall immediately surrender [the applicable] nonresidential real property to the lessor" if the nonresidential real property lease is not assumed or rejected by a debtor within 210 days after the bankruptcy filing). MOAC therefore has more than adequate interest in the appeal to satisfy Article III.

II. SECTION 363(m) IS NOT JURISDICTIONAL AND IS THEREFORE SUBJECT TO ESTOPPEL, WAIVER, AND FORFEITURE

A. Section 363(m) is Not a Jurisdictional Limitation, Even When it Applies

1. As petitioner's opening brief explained, *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), established a bright-line test—only if Congress "clearly states that a

[3] Transform suggests that the assumption would stand even if the assignment were vacated. Resp. Br. 30 n.19. Not so, without adequate assurance of future performance (in the form of an assignment), the MOAC Lease could not have been assumed. See 11 U.S.C. 365(b)(1), (3). Thus, both aspects of the Assignment Order rise or fall together, and the initial district court order correctly vacated the Assignment Order in its entirety. Pet. App. 100a.

threshold limitation on a statute's scope shall count as jurisdictional" will it be treated as such. *Id.* at 515-516. By contrast, "when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character." *Id.* at 516.

Transform's attempt to limit *Arbaugh*'s application to a particular "definitional provision" in Title VII, Resp. Br. 4, 21, 48, fails. Since *Arbaugh*, numerous opinions of this Court have recognized that decision as adopting a general "clear statement" rule for assessing when a limitation is jurisdictional in nature and have applied it to a wide variety of statutory provisions. See, *e.g.*, *Boechler, P.C.* v. *Commissioner*, 142 S. Ct. 1493 (2022) (time for seeking judicial review of tax collection due process hearing); *Fort Bend County* v. *Davis*, 139 S. Ct. 1843 (2019) (Title VII requirement to state discriminatory grounds in EEOC charge); *Hamer* v. *Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13 (2017) (time limit to file appeal under Fed. R. App. P. 4(a)); *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 409-413 (2015) (Federal Tort Claims Act limitations period); *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 161 (2013) (deadline for seeking Provider Reimbursement Review Board review); *Gonzalez* v. *Thaler*, 565 U.S. 134, 143 (2012) (AEDPA requirement to indicate "specific issue" in certificate of appealability); *Henderson* v. *Shinseki*, 562 U.S. 428, 439 (2011) (deadline to seek Veterans Court review); *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010) (statutory copyright registration requirement); *Union Pac. R.R.* v. *Brotherhood of Locomotive Eng'rs*, 558 U.S. 67, 82 (2009) (requirement to conference minor disputes prearbitration).

The reason is simple: the clear-statement test is a "readily administrable bright line" test, *Arbaugh*, 546 U.S. at 516, devised "'to bring some discipline' to the use" of the jurisdictional label, *Boechler*, 142 S. Ct. at 1497 (quoting *Henderson*, 562 U.S. at 435). The benefit of this easily administered standard is "then courts and litigants will be duly instructed and will not be left to wrestle with the issue." *Arbaugh*, 546 U.S. at 515-516. As the Court has observed, "[t]ardy jurisdictional objections" are unfair to litigants, reward gamesmanship, and "result in a waste of adjudicatory resources." *Sebelius*, 568 U.S. at 153.

This case exemplifies the costs of mislabeling a limitation "jurisdictional." In deciding MOAC's stay motion, the bankruptcy court relied on Transform's "reiterated" disavowal that Section 363(m) had any application to conclude that MOAC faced no irreparable harm in the absence of a stay. BIO App. 7a. The parties then fully litigated the merits of MOAC's appeal, resulting in a decision vacating the Assignment Order. Pet. App. 100a. Only then did Transform reverse course to argue that Section 363(m) not only applied, but was jurisdictional. Pet. App. 26a.

Transform never contends that Section 363(m) contains a clear statement that it is jurisdictional, and for good reason. Far from clearly removing the appellate courts' jurisdiction over appeals from unstayed sale orders, the single sentence in Section 363(m) *twice* expressly contemplates the *exercise* of such jurisdiction. The first clause of the subsection makes clear that it addresses the consequences of "reversal or modification on appeal" of a sale order, which presupposes jurisdiction to hear the appeal. 11 U.S.C. 363(m). Later, the

text states that such reversal or modification does not "affect the validity of a sale or lease" whether or not the purchaser "knew of the pendency of the appeal," which again presupposes that an appeal may be pending. *Ibid.*

Transform even concedes that Section 363(m) is not jurisdictional as to certain remedies, such as determining the allocation of sale proceeds and the validity of liens on sold property, but nonetheless argues the statute *is* jurisdictional as to other remedies that would invalidate a sale. Resp. Br. 47.[4] Transform's admission that various remedies *are* available on appeal confirms that Section 363(m) establishes only a remedial limitation, not a constraint on appellate subject-matter jurisdiction. "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." *Avco Corp.* v. *Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 561 (1968). "[J]urisdiction is a question of whether a federal court has the power * * * to hear a case"; "relief is a question of the various remedies a federal court may make available." *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979). Section 363(m) speaks only to the latter, identifying circumstances in which one form of relief is unavailable.

2. Like many litigants before this Court following *Arbaugh*, Transform invokes *Bowles* v. *Russell*, 551 U.S. 205 (2007), arguing that Section 363(m) is like the

[4] As discussed in Section III, *infra*, Transform is wrong that the relief sought by MOAC would invalidate the Sale Order.

statutory requirement for a timely appeal and different from all the other statutes, because Section 363(m) codifies "historic practice" treating this rule as jurisdictional. Resp. Br. 4. Transform's argument fares no better than all the other unsuccessful attempts to find refuge in *Bowles*. There is no history analogous to that in *Bowles* of treating the absence of a stay as jurisdiction defeating.

In *Bowles*, the Court based its jurisdictional finding with respect to 28 U.S.C. 2107 on this Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional" under "a century's worth of precedent and practice in American courts." *Bowles*, 551 U.S. at 209 n.2, 210. Indeed, the Court referenced at least six cases over 160 years as reiterating the rule that "statutory limitations on the timing of appeals [are] limitations on [the appellate courts'] jurisdiction." *Id.* at 210. In *Reed Elsevier*, the Court underscored the exceptional pedigree of the rule followed in *Bowles*. "*Bowles* emphasized that this Court had long treated such conditions as jurisdictional, including in statutes *other* than § 2107, and specifically in statutes that predated the creation of the courts of appeals." 559 U.S. at 168. Thus, the "relevant question" is "not * * * whether [a particular statute] itself has long been labeled jurisdictional, but whether the type of limitation that [the statute] imposes is one that is properly ranked as jurisdictional absent an express designation." *Ibid.* It did not matter, therefore, that "courts have long treated" 17 U.S.C. 411(a)'s requirement of trademark registration as jurisdictional. *Id.* at 167.

Under the reasoning of *Reed Elsevier*, Transform's attempt to manufacture a "historic practice" argument

based on the courts' treatment of former Federal Rule of Bankruptcy Procedure 805 necessarily fails. Like the argument in *Reed Elsevier*, Transform's argument fails to address the "relevant question." Transform does not identify a broad swath of decisions by this Court holding "such conditions as jurisdictional, including in statutes other than" the one at issue here. *Reed Elsevier*, 559 U.S. at 168. To the contrary, as discussed above, *Republic* establishes the opposite. While the government "describe[d] as a settled admiralty principle that jurisdiction over an *in rem* forfeiture proceeding depends on continued control of the res," this Court could "find no such established rule in our cases." 506 U.S. at 84-85. And the Court expressly held that neither *The Little Charles* or *The Ann* (the same cases on which Transform principally relies, Resp. Br. 39) stood for that proposition, but rather for "the rule that the court must have actual or constructive control of the res when an *in rem* forfeiture suit is *initiated*." *Republic*, 506 U.S. at 85-87 (emphasis added).

The rule Transform urges "does not exist, and [there is] no reason why it should." *Republic*, 506 U.S. at 87. Whereas the fiction of *in rem* jurisdiction developed to expand remedies for aggrieved parties, the Court refused to contort it into a rule "provid[ing] a prevailing party with a means of defeating its adversary's claims for redress" on appeal. *Ibid.*

In the face of *Republic*'s rejection of Transform's purported general rule, its characterization of lower courts' decisions applying Section 363(m)'s predecessor rule of bankruptcy procedure could hardly satisfy the *Reed Elsevier* standard. But the cases Transform cites do not, in fact, stand for the proposition Transform ad-

vocates. None treated Former Bankruptcy Rule 805 as a jurisdictional bar to reviewing a court-authorized transfer. Rather, those courts that dismissed appeals for inability to grant relief did so because, unlike Transform, the transferee was "not a party to th[e] litigation." *Bennett* v. *Robison (In re Combined Metals Reduction Co.)*, 557 F.2d 179, 193 (9th Cir. 1977); see *Fink* v. *Cont'l Foundry & Mach. Co.*, 240 F.2d 369 (7th Cir. 1957) (same). By contrast, when "the action can be undone by orders directed to parties before the court," the courts upheld their appellate jurisdiction. *Bastian* v. *Lakefront Realty Corp.*, 581 F.2d 685, 691 (7th Cir. 1978) (distinguishing *Fink*); see *Taylor* v. *Lake (In re CADA Invs., Inc.)*, 664 F.2d 1158, 1161 (9th Cir. 1981) (affirming bankruptcy court ruling to set aside order approving sale of land and distinguishing cases that involved purchasers that "are not parties to the appeal before the court" because in those circumstances the court "cannot grant effective relief in their absence"). Transform has been a party at every stage in these proceedings and, as discussed *supra*, has consented to the bankruptcy court's continuing jurisdiction over Assignment Order disputes.

Transform's evidence of "historical practice" thus falls far short of what this Court has demanded to satisfy *Arbaugh*'s clear-statement standard.

B. Estoppel, Waiver, and Forfeiture Preclude Transform's Reliance on Section 363(m)

Because Section 363(m) is nonjurisdictional, any protections it afforded Transform were subject to estoppel, waiver, and forfeiture. See *Holland* v. *Florida*, 560 U.S. 631, 645 (2010) (nonjurisdictional statutory defenses are "subject to waiver and forfeiture"); *Zipes* v.

Trans World Airlines, Inc., 455 U.S. 385, 393 (1982) (nonjurisdictional statutes are "subject to waiver, estoppel, and equitable tolling"). Each of those doctrines would, on these facts, preclude Transform's reliance on Section 363(m).

Transform waived any rights under Section 363(m) by disclaiming any intention to rely on such provision when opposing MOAC's effort to obtain a stay. Transform's counsel *twice* confirmed that it would not rely on Section 363(m) when the bankruptcy court asked "you're not going to go to the district and say 363(m) applies here." BIO App. 5a. See *Hamer*, 138 S. Ct. at 17 n.1 ("[W]aiver is the intentional relinquishment or abandonment of a known right." (citations omitted)). Transform cannot revoke the waiver now by claiming counsel was "mistaken." Resp. Br. 16 n.5; see *American Atheists, Inc.* v. *Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 233 n.3 (2d Cir. 2014) ("[C]ircumstances manifest waiver" when party disavows, but later attempts to revive, argument.).

Transform separately forfeited any Section 363(m) argument by failing to raise it in district court until after that court ruling against Transform on the merits. See *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) (where party "failed to raise a defense of untimeliness until after the District Court had reached the merits, it forfeited that defense").

Judicial estoppel also applies to preclude Transform from reversing the position it took in bankruptcy court disclaiming Section 363(m)'s application. BIO App. 5a-9a. Judicial estoppel applies if (a) a party's later position is "clearly inconsistent" with its earlier position, (b) another court accepted that party's earlier position, and

(c) the party seeking to assert an inconsistent position would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire* v. *Maine*, 532 U.S. 742, 750-751 (2001). The district court observed that "[a]ll the conditions for application of judicial estoppel would seem to be met here" because the bankruptcy court relied on Transform's confirmation that Section 363(m) did not apply when declining to grant MOAC's request for a stay pending appeal. Pet. App. 32a.

Transform's attempt to downplay the impact of its disavowal of Section 363(m) on the bankruptcy court's stay denial mischaracterizes the record. Transform's reliance on the bankruptcy court findings regarding the other stay factors, Resp. Br. 16 n.6, ignores that Transform's Section 363(m) representations directly influenced the bankruptcy court's views on *each* of the factors. The court's finding of no irreparable harm was based directly on Transform's representation that it "couldn't rely on [Section] 363(m)." BIO App. 5a, 8a. In turn, the court found that "*because of the lack of irreparable harm*, I don't believe a stay is in the public interest." *Id.* at 9a (emphasis added). Likewise, the court believed MOAC would "have to have a huge showing on the merits *because there's no irreparable harm*." *Id.* at 9a-10a (emphasis added) ("The more irreparable harm, the less of a showing on the merits and vice versa."). Transform's representation that it would not invoke Section 363(m) was thus critical to all three stay factors. If the bankruptcy court had entered a stay, Transform would have had no defense under Section 363(m). This is precisely the circumstance in which judicial estoppel applies.

III. THE RELIEF REQUESTED BY MOAC IS NOT PRECLUDED BY SECTION 363(m) EVEN IF IT WERE JURISDICTIONAL

Even if Section 363(m) were jurisdictional and not subject to estoppel, waiver, and forfeiture, it would not apply to MOAC's appeal. Section 363(m) applies only to an "appeal of an authorization under subsections (b) or (c)" of Section 363, see 11 U.S.C. 363(m), but the relevant order here is the lease assignment, which was "pursuant to Section 365." J.A. 263. Transform's arguments to the contrary rest on the false premise that the lease assignment was itself the relevant Section 363 "sale" transaction that would be invalidated. It was not. The Sale Order had already been consummated by the time of the Assignment Order, and vacatur of the Assignment Order would not "invalidate" the Sale Order.

A. As an initial matter, the bankruptcy court did not view the Assignment Order as a sale order under Section 363 that was directly subject to Section 363(m). Specifically, the bankruptcy court explained that the Assignment Order "is a 365 order. It's an outgrowth of the sale. It's not a 363(m)." BIO App. 7a. The court explained that "if [MOAC] were appealing the whole sale, which is already closed, I understand your argument" that Section 363(m) might apply. *Id.* at 5a. But, as MOAC was only "taking about [appealing] just one of the roughly 600" leases, the court stated that it "can't

imagine 363(m) as far as the sale is concerned applying here." *Ibid.*[5]

Nor did the Second Circuit hold that the Assignment Order was directly subject to Section 363(m). Rather, the Second Circuit applied Section 363(m) to the Assignment Order based on its determination that the lease assignment was "integral" to the prior February 2019 asset sale. Pet. App. 6a-7a (considering "whether the assignment is integral to the Sale Order such that § 363(m) applies to the assignment" and concluding, based on stock language in the Assignment Order, that the lease assignment "was integral to the Sale Order").

The statutory authority for a debtor or trustee to assign a lease in bankruptcy is in Bankruptcy Code Section 365(f), not Section 363(b) or (c). Contrary to Transform's assertions (Resp. Br. 33-36), there is no need to invoke Section 363(b) or (c)—the only provisions referenced in Section 363(m)—in order to assign a lease. See 3 Collier on Bankruptcy ¶ 365.09 (16th ed., rev. 2022) ("Unlike sections 363 and 364, section 365 does not contain a provision providing for statutory mootness.").

As the Third Circuit explained in *In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (1990), "[w]hile § 363(m) contains a provision requiring a stay, the section that applies in this case, § 365 does not." *Id.* at 1085. The court correctly "decline[d] to interpret the mootness

[5] Transform points (Resp. Br. 13) to references in the Assignment Order to Section 363 as evidence that the lease assignment was a Section 363 sale, but those references merely reflect, as the bankruptcy court explained, that the Assignment Order was an "outgrowth" of the prior sale. BIO App. 7a.

principles in such a way that would, in effect" extend Section 363(m) to "the assignment of leases under § 365." *Ibid.* Contrary to Transform's suggestions, *Joshua Slocum* was not "repudiated in subsequent decisions." Resp. Br. 35. Rather those case distinguished *Joshua Slocum* on the facts because those cases involved actual Section 363 sales, including separate purchase price consideration. See *Krebs Chrysler-Plymouth, Inc.* v. *Valley Motors, Inc.*, 141 F.3d 490, 498 (3d Cir. 1998)) (involving auction for sale of auto dealership franchise agreements under Section 363); *L.R.S.C. Co.* v. *Rickel Home Ctrs., Inc. (In re Rickel Home Ctrs., Inc.)*, 209 F.3d 291, 298 (3d Cir. 2000) (noting debtor "specifically requested authorization to *sell* the 41 Staples leases" and conducted an auction, resulting in a $35.5 million purchase price).

B. Contrary to Transform's suggestion, there was no independent "new and unique" purchase price consideration negotiated between Sears and Transform for the MOAC Lease that would render the lease assignment a separate sale. Resp. Br. 36-37. Notably, Transform does not dispute that if the bankruptcy court had denied the requested lease assignment, or if the Assignment Order were vacated, Transform's purchase price under the purchase agreement (which had already closed in February 2019) would remain unchanged. The only "consideration" identified by Transform—curing defaults under the lease, escrowing funds to cover future charges on the property, and committing to sublease the property within two years, *id.* at 13-14—is not purchase price consideration at all. Rather, Transform is merely identifying the cost of complying with statutory requirements in Section 365 to cure lease defaults

and provide the landlord with adequate assurance of future performance. 11 U.S.C. 365(b) and (f).

Because reversal of the Assignment Order would not affect the validity of the Sale Order, Section 363(m) is inapplicable even if were jurisdictional and not subject to waiver. On any view, therefore, Section 363(m) properly construed does not preclude granting relief on MOAC's appeal.

CONCLUSION

For the foregoing reasons and those stated in MOAC's opening brief, the decision of the court of appeals should be reversed.

Respectfully submitted,

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